IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1941.

No. 706

CITY OF CHICAGO, a Municipal Corporation, BOARD OF HEALTH OF THE CITY OF CHICAGO, DR. ROBERT A. BLACK, Health Commissioner and Acting President of Board of Health of the City of Chicago,
Petitioners,

vs.

FIELDCREST DAIRIES, INC.,
Respondent.

PETITIONERS' OBJECTIONS TO RESPONDENT'S MOTION TO STAY MANDATE AND TO MODIFY THE JUDGMENT AS TO COSTS.

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CHAMPLIN-SHEALY COMPANY, CHICAGO 365

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Objection to Motion for Stay of Mandate.

The petitioners object strenuously to any stay of the mandate. A stay would delay the prosecution of the proceedings in the state court brought by the respondent's parent corporation, the Dean Milk Company. The first step to be taken by the City of Chicago in that case is to file a petition to vacate the temporary injunction obtained by the Dean Milk Company on the basis of the federal

court injunction which the judgment of this court vacates. The petition to be filed must allege that the federal court injunction no longer exists. Consequently the petition cannot be filed until the federal District Court has entered its order based on the mandate of this court.

Any delay in the prosecution of the state court case will be harmful to the interests of the City of Chicago because of the urgency of clarifying the doubt cast by the holding of the Circuit Court of Appeals on important powers of the city to adopt public health regulations.

Objections to Motion as to Costs.

The judgment properly allowed costs to the petitioners because it was the respondent (the trial court plaintiff) who selected a federal court in which to sue the petitioners. In urging the court to provide that neither party should recover costs against the other, the respondent is saying that the petitioners should bear almost all the costs, for the petitioners were on the losing side in the District Court and in the Circuit Court of Appeals. From the respondent's argument it would almost seem that the federal forum was originally chosen by the petitioners rather than by the respondent.

In an attempt to shift to the petitioners the responsibility for the federal court litigation, the respondent reviews some aspects of the state court litigation and comments that "the petitioners resisted the trial of the similar case in the state court" and that the incurring of costs was as much due to the "unsuccessful desire of the petitioners to have the case determined by the Federal courts" as it was due to the respondent's prosecution of the suit after the 1939 statute was enacted. The respondent refers par-

ticularly to contentions made by the petitioners in the state court that the determination of the state court case should await the determination of the federal court case.

There were obvious and compelling practical reasons for the petitioners to take this position. The state court case was not begun until May 15, 1940, after there had been extended hearings before the federal master resulting in an accumulation of a record of three thick volumes and after the master had rendered a report favorable to the city. The city did not wish to be compelled to spend the time and money involved in the duplication of this proceeding in the state courts. The city was placed in this dilemma by the respondent and its parent corporation, the Dean Milk Company. The city had no alternative but to defend both federal and state court suits. The respondent's responsibility for the federal court case is not affected by the fact that the petitioners sought to meet the respondent on the merits.

The respondent boldly suggests that the city, which was being sued in the federal and state courts by the respondent and its parent corporation, should have also sought to test the validity and construction of the ordinance in the state courts by proceeding against other dairies selling milk in paper containers after the federal court injunction was entered in October, 1940. Obviously any attempt to prosecute another dairy company would have been thwarted by a temporary injunction obtained on the basis of the federal court injunction in this case. Had the city discriminated against other dairy companies which lacked an injunction permitting them to sell milk in paper containers, the respondent would have had a monopoly over this type of milk distribution in Chicago.

Important factors in both the state and federal court litigation are overlooked in the respondent's motion.

1. In an attempt to mitigate its error in seeking a federal court adjudication of state issues, the respondent argues as if there were only one state issue in the case, the effect on the city's power of the Illinois Milk Pasteurization Plant Act which went into effect on July 1, 1939 (Laws of Illinois, 1939, p. 660) after this suit was begun. The other local question was that of the construction of the ordinance—i. e., whether or not the Chicago Board of Health correctly construed the ordinance to forbid the use of paper milk containers. The respondent alleged in its complaint that it was entitled to an injunction on the ground that the ordinance permits the use of paper milk containers (R. 14).

2. It seems clear that the federal court litigation was originally planned by the respondent's parent corporation to avoid a determination of the local questions by the state courts. In 1936 the Dean Milk Company, an Illinois corporation, asked for a permit to sell milk in Chicago in paper milk containers (R. 1692). The permit was not received. The Dean Milk Company had the respondent corporation, Fielderest Dairies, Inc., incorporated in the State of Michigan on November 5, 1937 (R. 844, 1609-12). The respondent obtained authority to do business in Illinois on November 29, 1937 (R. 845, 1613-18). The Dean Milk Company's plant is at Chemung, Illinois (complaint in *Dean Milk Company* case, Joint Statement of Counsel, p. 9) where the plant of the respondent is also located (R. 1030). The allegations of the complaint in the *Dean Milk Company* case (Joint Statement of Counsel, pp. 2-23) and of the complaint in the case at bar (R. 2-15) show clearly that the two corporations in fact carry on one and the same business. These facts indicate that the respondent

corporation was created in order to provide diversity of citizenship as a ground of federal jurisdiction.

3. In saying (motion, p. 3) that the Dean Milk Company began the state court suit "on May 15, 1940 following the passage of the Illinois Milk Pasteurization Plant Act of 1939," the respondent implies that the Dean Milk Company, out of respect for "the appropriate relationship between federal and state authorities," began to litigate the state issue in the state courts when it emerged in the case. That is not why the state court suit was filed. It was begun by the parent corporation only when the federal master ruled against the subsidiary corporation. The master filed his report in the District Court on April 27, 1940 (R. 1710). The state court suit was begun on *May 15, 1940.* The real significance of this date is that *on the preceding day, May 14, 1940,* the City of Chicago urged the federal District Court to enter a decree in accordance with the master's report (R. 1751) but, at the request of counsel for the respondent, who stated that there was no urgency in connection with the disposition of the case, the District Court continued the matter to October, 1940 (R. 1752; see affidavit in Joint Statement of Counsel, pp. 39-40). Obviously the respondent's parent corporation began the state court suit only because it appeared that its subsidiary corporation might be unsuccessful in the federal court litigation.

4. Throughout the course of the litigation the respondent has asserted the invalidity of the Chicago ordinance under the fourteenth amendment to the federal constitution. Mr. Justice Douglas noted in the opinion that this issue "lurks in the case even though it not be deemed substantial." The presence of this issue gave the federal court a ground of federal jurisdiction in addition to the diversity

of citizenship. If only the latter ground had been present, it would have been a simple matter for this court to dismiss the case, as was done in *Hawks* v. *Hamill*, 288 U. S. 52 (1933), on the ground of the reluctance of federal courts to grant injunctive relief on purely local issues. The mere raising of the federal constitutional question by the respondent made such a disposition of the case impossible, for the federal courts had a duty to decide the federal question. Yet there is so little foundation for the respondent's contention of alleged unconstitutionality that *it did not cite in its brief one federal court decision to support it.* The mere raising of this question greatly prolonged the litigation, for it required the extended hearings before the master on the question of the reasonableness of the ordinance in addition to preventing a final disposition of the case here as in the *Hawks* case. This factor is important in considering the responsibility for the federal court litigation.

Since the judgment of this court reversed the judgment of the lower court, costs are properly taxed against the respondent under subdivision 3 of Rule 32 of this court:

> "In cases of reversal of any judgment or decree by this court, costs shall be allowed to the appellant or petitioner, unless otherwise ordered by the court."

The mandatory language of section 254 of the Judicial Code (28 U. S. C. 352) requires that printing costs be taxed against the respondent. Section 254 provides:

> "There shall be taxed against the losing party in each and every cause pending in the Supreme Court the cost of printing the record in such case, except when the judgment is against the United States."

Decisions of this court in which cases have been dismissed on jurisdictional grounds indicate that the costs should be taxed against the respondent. In *Mansfield etc.*

Railway Co. v. *Swan*, 111 U. S. 379 (1884), even though the trial court's judgment was reversed, costs were taxed against the plaintiff in error because the reversal was on the ground that the plaintiff in error had removed the case to the federal court from a state court without diversity of citizenship appearing in the record. In *Graves* v. *Corbin*, 132 U. S. 571, 591 (1889), where the trial court lacked jurisdiction, costs were taxed against the defendant who obtained a removal from the state court even though the plaintiff had urged the Supreme Court to rule on the merits. In *Oklahoma Gas and Electric Co.* v. *Oklahoma Packing Co.*, 292 U. S. 386 (1933), where the decree of the trial court was vacated and the cause remanded to preserve the right of appellant to have the trial court's judgment reviewed, costs were taxed against the appellant because of lack of jurisdiction of this court to entertain a direct appeal even though at the time the appeal was taken the correct procedure under section 266 of the Judicial Code was unsettled.

The opinion in *Railroad Commission* v. *Pullman Company*, 312 U. S. 496 (1941), does not indicate what disposition this court made as to costs. Even if the costs were taxed against the Railroad Commission, there are good grounds here for requiring the respondent to pay them. In contrast to the lack of substance in the constitutional issue in the case at bar, Mr. Justice Frankfurter noted that the constitutional issue was "more than substantial," touching "a sensitive area of social policy." And in the *Pullman Company* case there was not the situation presented here of a federal court plaintiff and its parent corporation going back and forth between the federal and state courts in an attempt to find a forum which would render a favorable decision.

The respondent chose the federal forum to litigate the state issues. The petitioners were compelled to defend the litigation and should not be compelled to pay the costs now that this court has determined that the litigation should have been carried on in the state courts. If the City of Chicago is unsuccessful in the state court litigation, it will be compelled to pay the costs involved there. Certainly it should not be subjected also to costs in the federal court when the respondent should not have begun the litigation there. Of course, if the city is successful in the state courts, it should not be compelled to pay any costs whatever. No matter what the outcome of the state court litigation may be, the costs in this case should be borne by the respondent in accordance with the judgment entered by this court on April 27, 1942.

We urge the court to deny the motion to stay the mandate and the motion to modify the judgment as to costs.

Respectfully submitted,

CITY OF CHICAGO, a Municipal Corporation,
BOARD OF HEALTH OF THE CITY OF CHICAGO,
DR. ROBERT A. BLACK, Health Commissioner and Acting President of Board of Health of the City of Chicago,
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